evidence to suggest that the latter was right. Mr. Ng Sang Choon was not called to testify to the number of lorry loads of ore delivered. There was a wide discrepancy even between the number of lorry loads claimed on each side — the appellant said the number was 1,537; according to Mr. Stevens, 1,366. The latter, an accountant, naturally could not say how many tons of washed ore remained from raw ore after washing and drying. In his "opinion" — which can hardly count for anything, not being that of an expert or supported by any reasons — it was 70%. Why not 80? Even assuming 70% to be correct, 6,830 tons of raw ore would produce 4,781 dry tons, which is 659½ tons more than what the respondents were willing to give credit for. In short, therefore, no satisfactory evidence whatsoever was adduced to support the respondents' claim that they took delivery of only 4,121½ dry long tons and no more. The learned judge had stated that the amount of 6,830 tons was "arrived at after weighing had been done by the employees of the defendant company." In the teeth of Mr. Steven's evidence this was manifestly incorrect. Accordingly, in my judgment, the respondents failed to discharge the onus that lay on them, and their counterclaim ought to have been dismissed.

In the result, the appeal succeeds both as regards the claim and counterclaim, with costs to the appellant here and in the court below.

Barakbah L.P. concurred.

Appeal allowed.

Solicitors: *Lim Cheng Ean & Co.; Maxwell Kenion, Cowdy & Jones.*

THAM KONG v. OH HIAM & ORS.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) September 18, 1967]

[K.L. — Federal Court Civil Appeal No. X. 70 of 1966]

Contract — Sale of rubber land — Sale effected pursuant to court approval — Rectification of the contract on ground of mistake — Unilateral mistake — Question of fact — Contracts (Malay States) Ordinance, 1950, s. 21 — Evidence Ordinance, 1950, ss. 91 & 92.

This was an appeal against the decision of Gill J. ([1967] 1 M.L.J. 65) setting aside the sale and transfer of a half acre of land, out of a total area of 34½ acres sold, on the ground that the transferor (since deceased), while making the sale, was under the mistaken belief that she was selling rubber land, whereas this particular piece of land contained an old plank house but no rubber trees.

By an agreement dated September 30, 1956 the 1st respondent (Oh Hiam) as administratrix of her husband's estate, contracted to sell at $450 per acre to the appellant seven pieces of land certified as rubber land. Six pieces were contiguous and situated at Gombak, one piece was in a different locality at Setapak Road on which stood an old plank house among some old rubber trees and its area was about ½ acre. Respondents 2 to 9 are joint beneficiaries in the estate with their mother the 1st respondent.

On September 23, 1957 the 1st respondent pursuant to the said agreement obtained court approval of the sale to the appellant under the Probate and Administration Enactment. Formal transfer of the seven pieces of the land was thereafter effected by her on January 20, 1958.

One of the beneficiaries, Teo Kim Choon, realized that the Setapak Road land had a house on it and was therefore, not strictly rubber land and took the view that it was sold by mistake with the other six pieces of land. The value at this time was nothing like $450 per acre due to potential building development. So overtures were made to obtain a reconveyance from the purchaser which failed. This beneficiary was the prime mover in this scheme to obtain a return to the *status quo*. On July 30, 1958, action was commenced in the name of the respondents and their mother, to have a rectification of the contract and all that had taken place to be set aside, on ground of the mistake of inclusion of the Setapak Road land in the contract. Soon after the commencement of the action the 1st respondent died, and the 2nd and 7th plaintiffs were substituted in her place after grant to them of letters of administration *de bonis non*.

The main grounds of appeal were, first, that the learned judge erred in his finding of mutual mistake, contrary to a specific plea of unilateral mistake, and secondly, that he erred in holding the respondents entitled, on the evidence, to the relief of rectification.

Held: the vendor intended to sell all seven pieces and the purchaser intended to buy the same and there was no mutual mistake or common mistake. Appeal allowed.

Cases referred to:—

(1) *Okill* v. *Whittaker* (1847), 2 Ph. 338; 41 E.R. 973.

(2) *F. E. Rose Ltd.* v. *Wm. H. Pim Ltd.* [1953] 2 All E.R. 739.

(3) *Blay* v. *Pollard & Morris* [1930] 1 K.B. 628, 634.

(4) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] 2 W.L.R. 81, 90-91.

(5) *Tamplin* v. *James* (1880), 15 Ch. D. 215, 217, 221.

(6) *Hasham* v. *Zenab* [1960] 2 W.L.R. 374, 381.

(7) *Chin Keow* v. *Government of Malaysia* [1967] 2 M.L.J. 45.

(8) *Yuill* v. *Yuill* [1945] P. 15, 19.

(9) *Watt* or *Thomas* v. *Thomas* [1947] A.C. 484.

(10) *Norwich Union Fire Insurance Society* v. *William H. Price Ltd.* [1934] A.C. 455, 463.

FEDERAL COURT.

K. K. Lam for the appellant.

S. D. K. Peddie for the respondents.

Cur. Adv. Vult.

Barakbah L.P.: By an agreement dated 30th September, 1956 (Exhibit D.6), the first respondent, the administratrix of the estate of Teo Teow Guan, deceased, agreed to sell to the appellant seven pieces of land held under E.M.R. Nos. 4139, 4140, 5339, 4219, 4076, 5634 and 5633 in the Mukim of Setapak for Lots Nos. 2663,

2664, 3660, 2771, 2562, 1538 and 1537 respectively for the sum of $450 per acre. Respondents 2 to 9 are the beneficiaries of the said estate. On 1st August, 1967, the first respondent made an application to the court for an order that she be at liberty to sell all the seven pieces of land to the appellant. On 23rd September, 1957, an order was duly made in terms of the said application and on 20th January, 1958, a formal transfer was made by the first respondent to the appellant. Among the seven pieces of land was one piece held under E.M.R. No. 5339 for Lot No. 3660 (hereinafter referred to as the "said land") which is just under half an acre in area and was situated at the 3rd mile Setapak Road, Kuala Lumpur, whereas the other six pieces with a total area of about 34 acres were situated at the 11th mile, Gombak. The said land had a house on it known as No. 99 Klang Gates Road, Kuala Lumpur. The respondents alleged that the first respondent intended to sell only the rubber lands at Gombak and the said land at Setapak Road was included by mistake and on 30th July, 1958, they filed this suit in court praying for:—

"(i) an order that the said order of court dated the 23rd day of September 1957, be set aside;

(ii) that the sale of the said lands aforesaid be also set aside or in the alternative that such sale be set aside in so far as it conveys lot No. 3660 to the defendant;

(iii) an order that the said agreement of sale between the 1st plaintiff and the defendant be set aside or in the alternative that it be set aside in so far as it agrees to convey Lot No. 3660 to the defendant;

(iv) an injunction restraining the defendant from disposing of or dealing in any other manner with the said lands until the determination of this case or alternatively for damages; and

(v) for such further or other order as the court deems fit and just."

On 24th August, 1958, the first respondent Madam Oh Hiam died and respondents 2 to 9 obtained letters of administration *de bonis non*. On 18th August, 1966, judgment was given in their favour and the appellant now appeals to this court.

It is not disputed that the seven pieces of land were mentioned in the grant of letters of administration (Exhibit P.3), that there was a proper sale and transfer by order of court and that all the title deeds were registered in the Land Office. According to the Certificate of Registration of Cultivation (Exhibit D.9), all the seven pieces of land were certified as rubber lands and the dispute before us now is in connection with the said land only which happened to have a house on it and is just under half an acre in area, situated at the 3rd mile Setapak Road. It was alleged by the respondents that it was never their intention to include the said land in the agreement for sale. The first respondent had included it by mistake.

According to section 21 of the Contracts (Malay States) Ordinance, 1950, where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. Mistakes may be classified into:— (1) common mistake; (2) mutual mistake; and (3) unilateral mistake. Mistake is common where both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact. The mistake is mutual where the parties misunderstand each other and are at cross-purposes. In unilateral mistake one only of the parties suffers from some mistake. The statement of claim alleges there was a unilateral mistake on the part of the respondents, but the learned judge found that there was a common mistake. I do not think I need go into the question of whether there was a unilateral, common or mutual mistake as according to the evidence on record I hold the view that there was no mistake at all on the part of either or both parties for reasons which I am about to state.

In the grant of letters of administration (Exhibit P.3) all the seven pieces of land were grouped together and so were they in the agreement (Exhibit D.6) which was prepared by P.W.1, an advocate and solicitor, who stated that as far as he could remember the lands to be sold were rubber lands. He also prepared the affidavit in support of Madam Oh Hiam's application for leave to sell the lands and nothing was said to him about the existence of any house on any piece of land. He admitted that the seven separate deeds were handed to him by Madam Oh Hiam. He also prepared the transfer after obtaining the court order.

P.W.3, P.W.4, P.W.5 and P.W.6 in their evidence stated that the sale was due to the fact that their mother needed money to go to Australia for treatment as she was sick. They did not know that the said land was included in the seven pieces of land to be sold. I am unable to accept this piece of evidence. The originating summons which mentioned the seven title deeds was served on them and they chose not to attend court at the hearing. The order for sale was made by the court on the certificate of non-appearance of the respondents. They were not minors and in my view they cannot now come to court and deny that they were aware of the sale of the said land. The respondents in their statement of claim stated that it was not the real intention of the first respondent to convey to the appellant any land except rubber lands. According to the Rubber Cultivation Book all the seven pieces were registered as rubber lands and the fact that one of them with a house on it was situated some miles away from the other pieces did not alter the condition of the land. Furthermore it was alleged in the statement of claim that the said

land was sold for $450 per acre only whereas it was actually worth $25,000 per acre as it was situated within the village of Setapak and within the Municipal boundaries. P.W.3 gave evidence that according to his estimate its value in 1956 was $40,000 but he did not have it properly valued. It must be remembered that the agreement for sale was made during the emergency period and Setapak was a black area. In her affidavit dated 30th July, 1957, in Originating Summons No. 122 of 1957 Madam Oh Hiam stated:—

"4. Since the emergency began in June, 1948 no tapping for rubber was carried on on the said lands because of the difficulty of getting tappers. The area was also considered a bad area for security reasons.

5. What was once considered an asset became a liability to the estate as the annual quit rents have to be paid. Moreover, owing to the difficulty of supervision and the lack of labourers for reasons given above the whole area is now overgrown with weeds and lallang.

6. In order to save the estate from waste as I am of the opinion this whole area may be covered with secondary jungle, I have on the 30th day of September, 1956, entered into an agreement of sale of the said lands to one Tham Kong of No. 28C, San Peng Road, Kuala Lumpur, at the agreed price of $450 an acre."

Although the said land was in the village of Setapak it was not possible to get a ready purchaser for it at the normal price. It is common knowledge that the value of land in black areas was at its lowest ebb as people were scared of living there. As the first respondent needed money badly for her treatment in Australia she had to sell the property for $15,500 to the appellant. According to her affidavit "This amounts to $15,500 for the whole area and therefore compares favourably with the value set on the said lands by the Collector of Estate Duty of $13,200." The certificate of the Collector of Estate Duty was made on 21st December, 2603 (1943), during the latter part of the Japanese occupation period. Therefore the value could be very much less in Malayan currency.

But in 1956, according to P.W.3, housing projects were coming up just opposite and right behind the said land and consequently there would be inflation in the value and the said land would be worth about $40,000. But there was no evidence on record of the market value of the said land. In my view there had been no mistake at all. The lands were sold for what they were worth at the time of the emergency and in the words of Lord Cottenham, Lord Chancellor, in *Okill* v. *Whittaker* [1] (at p. 974):—

"Suppose a party proposed to sell a farm, describing it as 'all my farm of 200 acres', and the price was fixed on that supposition, but it afterwards turned out to be 250 acres, could he afterwards come and ask for a re-conveyance of the farm, or payment of the difference? Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or a larger acreage is immaterial."

I would, therefore, allow the appeal with costs here and in the court below.

Azmi C.J. (Malaya): I have had the opportunity of reading both the judgments of my lord the Lord President and of my brother Ong Hock Thye F.J. and wish to express agreement with them.

I would, however, like to say the following few words on the question of burden of proof.

In a case of this nature the burden of proof is a heavy one and in support of this view I would refer to the judgment of Singleton L.J. in the case referred to by the learned trial judge himself when dealing with the question of rectification i.e. *F. E. Rose, Ltd.* v. *Wm. H. Pim, Ltd.* [2] at p. 744:

"The sole question is whether the buyers are entitled to rectification of the contracts. This depends, not on intention, but on proof that the written contract is not the contract into which the parties entered, and the terms of the contract into which they had entered must be clearly proved. In *Crane* v. *Hegeman-Harris Co. Inc.* ([1939] 1 All E.R. 665) Simonds J. said:—

> 'I would rather, I think, say that the court can only act if it is satisfied beyond all reasonable doubt that the instrument does not represent their common intention, and is further satisfied as to what their common intention was. For let it be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was. It is in the light of those principles that I must examine the facts of this somewhat complicated case.'

When that case was before the Court of Appeal Sir Wilfred Greene M.R., ([1939] 4 All E.R. 71) spoke of the 'high degree of conviction which unquestionably is to be insisted upon in rectification cases.'"

In the instant case what evidence have we got upon which the learned judge ordered the rectification not only of the contract but of the register of titles? The evidence appears to be first, the evidence of the four respondents who stated that they merely agreed to the sale of the other 6 pieces of land which were rubber land; secondly, that these pieces of land being in a residential area cannot therefore be intended to be included; thirdly, that the price of land is much higher than the price at which it was sold and fourthly, the evidence of the broker who said that he never took the intended purchaser to the land in question.

Against this oral evidence there was the fact that the matter was handled by a solicitor to whom was shown all the titles and also the fact that even after the sale the Land Office still considered these pieces of land as rubber land. See Certificate of Registration of Cultivation Exh. D.9.

In my view the plaintiffs/respondents have failed to discharge their burden.

Ong Hock Thye F.J.: This is an appeal against the decision of Gill J. in the High Court

at Kuala Lumpur, setting aside the sale and transfer of a half-acre of land, out of a total area of approximately 34½ acres sold, on the ground that the transferor (since deceased), while making the sale, was under the mistaken belief that she was selling rubber land, whereas this particular piece of land contained an old plank house but no rubber trees.

By an agreement in writing dated September 30, 1956, Oh Hiam, administratrix of the estate of Teoh Teow Guan deceased, contracted to sell to the appellant seven pieces of land, all of which are situate in the Mukim of Setapak, at the price of $450 per acre, subject to approval of such sale by the court, pursuant to the provisions of section 94(iii) of the Probate and Administration Enactment (now section 60(4) of the Probate and Administration Ordinance, 1959). Six pieces, containing very old rubber trees, are contiguous and situate at Gombak, at the 11th mile on the road between Kuala Lumpur and Bentong. The seventh, Lot 3660, is at the 3rd mile, Setapak Road, Kuala Lumpur, in area 4 poles short of half-an-acre. On it stands an old plank house, No. 99 Klang Gates Road, which was there at all material times. The transfer set aside affects only this particular property, which was ordered to be retransferred by the appellant to the 2nd and 7th respondents, as representatives, upon payment by them of the sum of $250.

Pursuant to the said agreement, Oh Hiam duly applied, by way of Originating Summons No. 122 of 1957, for leave of the court to sell these lands, citing as interested parties her eight children who were joint beneficiaries with her in the estate of their father. After service, they entered no appearance and on September 23, 1957 an order was made for sale and distribution of the proceeds among the beneficiaries entitled under the Distribution Enactment (Cap. 71).

On January 20, 1958, pursuant to the said order, Oh Hiam transferred E.M.R. 3633 and 5339, for Lots 1537 and 3660, to the appellant. Their aggregate area was 8 acres 1 rood 26 poles, and the consideration therefor $3,786, at the rate of $450 per acre. No claim was made by the respondents in respect of Lot 1537. By three other transfers of the same date the other five titles were acquired by the appellant's wife, brother-in-law and mother-in-law. No question was raised regarding these transfers.

On June 3, 1958 the appellant, by his solicitors, sent a notice to the tenant of No. 99 Klang Gates Road, requiring him to pay all future rents to his new landlord. As a result Teo Kim Choon, one of the beneficiaries, came to realise that Lot 3660 had been sold together with the other six pieces of land. On June 16, 1958 Teo Kim Choon, purporting to represent the administratrix and all other beneficiaries, instructed his solicitor to write to Mr. Y. S. Lee, the solicitor who had prepared the sale agreement and subsequent transfers, offering the appellant the eirenicon of retransferring this property as the alternative to litigation. The appellant rejected the overtures.

On July 30, 1958 action was commenced in the name of the respondents and their mother. The prime mover was Teo Kim Choon: as he put it, "I then gave instructions to my solicitors to have the sale set aside." Oh Hiam died on August 24, 1958, having been seriously ill of cancer since 1956, and the 2nd and 7th plaintiffs were substituted in her place after grant to them of letters of administration *de bonis non*. This explains why, as to one fact in acute controversy, namely, the identity of the successful broker concerned in the transaction, Oh Hiam's evidence was missing. Except as to facts turning on this point, there was no dispute as to the relevant facts.

Of the several grounds of appeal the main ones are, first, that the learned judge erred in his finding of a mutual mistake, contrary to a specific plea of unilateral mistake, and secondly, that he erred in holding the respondents entitled, on the evidence, to the relief of rectification. As to the first ground, mistake was pleaded in paragraph 6 of the statement of claim as follows:—

> "The plaintiffs aver that at the time the said agreement was made the defendant knew that the 1st plaintiff had by mistake agreed to sell to him the said Lot No. 3660 at $450 per acre which was a gross undervalue of the actual price of the said property and that it was not the real intention of the 1st plaintiff to convey to the defendant any lands except rubber lands. By reason thereof, the plaintiffs aver that the said agreement was null and void and of no effect."

These allegations were denied by the appellant in his defence. By an amendment, agreed to during the trial, he further pleaded that the first plaintiff was estopped from contending that she was mistaken as to the contents of the sale agreement. No argument, however, was addressed by counsel for either of the parties on this point and the trial judge was content to decide the action entirely on the issue of mistake. While estoppel is now raised again as a subsidiary ground of appeal, I do not think the point calls for consideration, for reasons which will appear later.

Reverting to the plea of mistake, different considerations, of course, applied according as the mistake was mutual or unilateral. The statement of claim in categorical terms had alleged a unilateral mistake. Nevertheless, the learned trial judge rested his decision on his finding that "it was as clear a case of common mistake as could occur." This was in line with the argument of counsel for the plaintiffs, although no amendment of the pleadings was ever applied for or made. It is clear law, as

stated by Scrutton L.J. in *Blay* v. *Pollard & Morris*,[3] that "cases must be decided on the issues on the record; and if it is desired to raise other issues, they must be placed on the record by amendment." See also the judgment of Lord Radcliffe in *Esso Petroleum Co. Ltd.* v. *Southport Corporation*.[4] However, rule 8(1) of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 gives this court "all the powers and duties, as to amendment or otherwise of the appropriate High Court." For my own part, therefore, I would assume that the pleadings were duly amended, so that all matters in controversy between the parties may be disposed of here and now. I am persuaded to do so after perusal of the record, since it is plain that such an amendment, even at this stage, in no way prejudices the appellant, for no further useful evidence can possibly be called by either side affecting the issue.

Before passing to the question of mutual or common mistake, I would first say a few words on the plea of unilateral mistake. The law covering the circumstances of this case is thus set out in 26 *Halsbury* (3rd Ed.) p. 898, citing *Tamplin* v. *James*:— [5]

"When the contract is clear the mistake of one party only will not, as a general rule, prevent the formation of a contract and consequent liability in damages being incurred for non-performance, for, if a man will not take reasonable care to ascertain what he is contracting about, he must take the consequences. Even if the mistake is such as a reasonably diligent man might fall into, a party cannot successfully resist an action for damages, nor, as a rule, specific performance, by a simple statement that he has made a mistake where there has been no misrepresentation and where there is no ambiguity in the terms of the contract."

According to the evidence and the relevant findings, there can be no doubt that, howsoever the mistake arose on the part of the vendor, it did so for reasons entirely unconnected with the appellant and for which he was in no way responsible. In a recent East African case, *Hasham* v. *Zenab* [6] which shows several points of resemblance to the present appeal, Lord Tucker, delivering the judgment of the Privy Council, said:

"Their Lordships have, accordingly, reviewed the whole of the evidence in the light of the above considerations and having regard to the pleadings. In this connection reference must be made to paragraph 11 of the defence. It reads as follows: 'In the further alternative the agreement sued upon was entered into by mistake in that the terms thereof have been drawn up as to contravene the intention of the parties by purporting to refer to the whole of the plot 58/1 L.R. 209 as aforesaid, whereas as it should have referred to the said portion of land only'. This is a plea of mistake common to both parties which was not the case made by the defendant. *Treating it, however, as a plea of unilateral mistake it could, in the absence of fraud, only afford ground for rescission if the mistake was induced by some innocent misrepresentation made by or on behalf of the plaintiff or by some misleading conduct on his part.*"

In the absence of any proof of fraud or misrepresentation, neither of which was pleaded or disclosed in the evidence, the respondents, therefore, must fail, had they relied on unilateral mistake.

Turning to the alternative, namely, a mistake common to both parties, the respondents' case, as the judge put it was:

"That Oh Hiam as administratrix intended to sell the rubber lands at Gombak, which were the only lands shown to the defendant, that there were no negotiations for the sale of the land at Setapak and that the grant relating to the land at Setapak got included in the agreement in the mistaken belief that it related to the several pieces of land at Gombak."

After a review of all the evidence, the learned judge came to the following conclusion:—

"Taking the evidence as a whole, I am satisfied that during the course of negotiations between the parties there was no mention made about the land at Setapak. The negotiations were in respect of rubber estate at the 11th mile, Gombak Road. There were six different titles to contiguous lands which the plaintiffs have described as the rubber estate belonging to the estate. The seventh title was handed along with the other titles to Mr. Lee at the time of the preparation of the agreement in the mistaken belief that it also related to a piece of land which formed part of the rubber estate."

In short, then, the judge held that the respondents, as plaintiffs, had proved their case. But what was the evidence on which he based his conclusions? Oh Hiam, being dead, could not testify to her real intention. True, she had sworn an affidavit in support of her application for leave to sell. But nowhere in the judgment does it appear that the statements in her affidavit influenced the judge in coming to his decision. Instead, he recounted what he thought was material evidence given by certain of the beneficiaries: to quote him,

"four of the plaintiffs (P.W.3, P.W.4, P.W.5 and P.W.6) have given evidence to say that their mother consulted them with regard to the proposed sale and that at no time was any mention made of the land at Setapak as being one of the lands intended to be sold."

With respect, I think the judge was in error in thus taking account of inadmissible evidence. Under section 32 of the Evidence Ordinance, 1950, statements, written or verbal, of relevant facts made by a person who is dead are relevant only when they relate to the cause of death, or were made in the ordinary course of business, or against the interest of the maker etc. What the deceased lady said or did not say, regarded as a pregnant negative, by way of disclosing her intentions, was clearly irrelevant under section 32 and should not have been admitted.

Then again, on another question of fact, the judge seems to have preferred the evidence of one broker, Lee Kim Seng, the respondents' witness, to the complete exclusion of that of another, Chow Wing Hing, who was called by the appellant. I quote from the judgment:

"I have considered the evidence of the two brokers very carefully and have come to the conclusion that, notwithstanding some apparent discrepancies in the evidence, Lee Kim Seng was the *only* broker in this case *because he struck me as being a more truthful witness than Chow Wing Hing.* Moreover, he is an independent witness and his evidence is corroborated by the evidence of Saw Ban Huat, another independent witness. Chow Wing Hing, on the other hand, is very much an interested party as he bought one of the rubber lands."

I regret to say that I find myself in disagreement again with these conclusions of the learned trial judge. It is true, as Sir Hugh Wooding said recently in *Chin Keow* v. *Government of Malaysia*: [7]

"He saw and heard the witnesses. His notes were not a verbatim reproduction of the *viva voce* proceedings but his own recorded account of the evidence. He was nonetheless aware of the questions asked and in a position of advantage to assess the answers given. He had thus impressed upon him the scope and nature of the evidence in a way denied to the appellate tribunal. No such tribunal could therefore have the same vivid appreciation of what the witnesses said and what they meant by what they deposed."

Nevertheless, despite the advantage he had, I think that, in coming to his conclusions, he was going much further than is justified by the evidence. In holding Lee Kim Seng to be a truthful witness, the judge overlooked or did not pause to consider certain cogent facts, which are facts in issue and not merely "apparent discrepancies". In the first place, Lee Kim Seng said:

"The option was signed by P.W.5. He and I signed: only both of us signed the option. Oh Hiam knew about the option . . . . I remember the price written on the option was $500 an acre . . . . *I was given an option by P.W.5* The option was written in English. The paper on which the option was written was 9 inches by 6 inches."

But, was he corroborated by P.W.5, who was Teo Peng Yong? Far from doing so, Teo said:

"I did not prepare any documents relating to the sale of the lands. I remember my mother informing me that she had asked an Indian to prepare some documents . . . . An option was given to a taxi driver named Mr. Lee . . . . *My mother gave him the option.* I did not know whether he found the buyer or not. I remember that the price was $400 per acre when the option was given . . . . I did not see the option."

Now, I can well understand that the minor discrepancy as to the price might be a simple mistake due to the lapse of years. But the acid test of the truth of Lee Kim Seng's story was (a) his allegation that he obtained the option from Teo Peng Yong, a statement of fact flatly denied by the latter; and (b) Teo Peng Yong manifestly could not have given an option which he had no power to do.

In the second place, assuming that Lee Kim Seng did hold an option to sell at $500 per acre, and that Saw Ban Huat, another independent witness, corroborated Lee as to his own refusal to buy the land at that price, the fact remains that Lee had failed to find a buyer. Giving another option to a different broker was a perfectly reasonable explanation for Chow Wing Hing coming into the picture. In fact both the appellant and Chow Wing Hing, the second broker, stated that the option given to Chow was at a different and lower price of $450. Why should Chow on any account be disbelieved? Why should there have been only one broker? After Lee had failed, was it not on the cards that Oh Hiam, being anxious to raise money, should have given an option to Chow at the lower price? In my judgment, therefore, even were the judge to believe in Lee, that was no reason whatever to reject the evidence of the second broker Chow. The latter was, moreover, regarded with some suspicion as an "interested party". I should observe that the decision, one way or the other, concerning Lot 3660, could result in neither benefit nor detriment to him. I do not agree that merely because a person had an interest in the outcome, his evidence should be discounted.

Having thus stated, as I am bound to do, my reasons for disagreeing with the learned trial judge's conclusions, I feel again no less diffident in accepting his opinion on a material fact, for which he gave no reasons, that Lot 3660 was "essentially residential land." The building, a temporary dwelling house, according to Teo Boon See, occupied a superficial area of approximately 1,900 square foot. The area of Lot 3660 is 20,691 square feet. Was the presence of the building, occupying one-tenth the total area, sufficient *ipso facto,* to convert rubber land into residential land? What if the land was a rubber estate of, say, 5 acres and the owner builds himself a house therein? Does it then become "essentially residential land"? Where and how does one draw the line? At any rate, it seems to have been ovelooked that, when Oh Hiam transferred this piece of land to the appellant, he was at the same time given the rubber cultivation book (Certificate of Registration of Rubber Cultivation) which every rubber estate owner is required by law to possess: see Rubber Supervision Enactment, 1937. The appellant duly exchanged the old book for a new one (Ex. D.9) which is still a valid document. With respect, therefore, I am unable to agree with the learned judge that Lot 3660 was "essentially residential land", if by that term he meant that no reasonable person would be likely to regard it as rubber land. It should further be remembered that Oh Hiam herself, in her estate duty affidavit, had grouped Lot 3660 with the other 6 lots *as rubber land,* and these 7 pieces were, on that basis, valued in 1948 at $13,200. These lands were again grouped together in the grant of letters of administration *de bonis non*: (see Exhibits P.1 & P.3), this subsequent grant being made on the application of two of these respondents after commencement of the action herein.

Be that as it may, the judge found that "it was only after the transfers were executed in January 1958 that (the appellant) came to know that he had obtained a transfer in respect of this piece of land in Setapak." In the result he held that "neither side knew about the inclusion of the property at Setapak in the agreement until after the transfers" and that it was "neither the intention of Oh Hiam to sell nor the intention of the defendant to purchase" such land.

This conclusion, of course, postulated that the evidence given to the contrary by the second broker Chow Wing Hing, and by the appellant himself, was rejected by the judge. He had indeed done so on the ground that there was only one broker, Lee Kim Seng. Consequently, in his opinion, both the appellant and Chow, gave false evidence. Speaking for myself, I do not think there is any evidence on the record showing that Chow Wing Hing was untruthful. The same cannot, in my judgment, be said of Lee Kim Seng. Since the decision of the learned trial judge was based on his belief in Lee as a witness of truth, it is on that account erroneous on the facts. His finding, for instance, that the appellant did not know, until much later, that he had bought Lot 3660, is an inference of doubtful validity. Apart from the fact that the appellant denied it, the mere inspection of the two titles and the plans thereon makes it impossible for anyone to say that the appellant did not know he was buying two pieces of land that were miles apart. Why did he choose to do so unless he knew what he was doing? As option-holder he should have had the first pick. If the answer is in the affirmative, on what grounds could there be a finding of common mistake?

In disagreeing with several of the learned trial judge's conclusions, as I have done, I would say no more than that I do so on the authority of their Lordships' pronouncements in *Yuill* v. *Yuill* [8] and *Watt or Thomas* v. *Thomas*.[9]

In my judgment, however, these differences of opinion call for no retrial. What was agreed to be sold by the agreement of September 30, 1956 was land *quâ* land. The agreement was expressed to be for the sale and purchase of land *simpliciter*. Hence the real question is whether, when this vendor intended to sell land and this purchaser likewise intended to buy land, and their expressed intention goes no further, it could necessarily be implied from surrounding circumstances that the nature or quality of one small piece of land was, nevertheless, a basic or fundamental term of the contract. In other words, would there have been a fundamental breach, had the land been bare or contained only a few scattered rubber trees, so that the purchaser could have resiled from the contract? If he could not, then the principle of mutuality should apply equally to the vendor who was concerned to evade a bad bargain. Consequently, I do not think that mental reservations on the part of either party should be permitted to prevail so as to invalidate a clear agreement in writing. In my view, the provisions of sections 91 and 92 of the Evidence Ordinance should apply to exclude all oral evidence contradicting, varying, adding to or subtracting from the terms of a written contract unless, in the case of any mistake, the same relates to an essential or integral matter sufficient to invalidate the contract. I am fortified in this view by the law thus stated in 26 *Halsbury* (3rd Ed.) at pages 898-9:—

> "Where parties enter into a contract under a mutual mistake as to the existence of the subject matter or of some fact or facts forming an essential and integral element of the subject matter, their consent is nullified and the contract is void. . . .
>
> When, however, the contract is for the sale of the subject thereof absolutely and not with reference to any collateral circumstances, the agreement is binding if the subject matter exists, notwithstanding that it is not in the condition supposed."

The vendor's alleged intention to sell nothing but rubber land was never disclosed to the appellant nor, by any admissible evidence, to her children. On the other hand, her intention to sell Lot 3660, together with the other six pieces of land, which was expressed in writing by the sale agreement, continued unchanged for over 15 months until January 20, 1958, when she executed the formal transfers. Was it not, therefore, an even possibility that it was actually Teo Kim Choon who decided, or persuaded her, to renegue on the sale only after his subsequent discovery that the activities of property developers in the vicinity of Lot 3660 had rendered this land more valuable? It was he who gave instructions for the action: she did not, as she must have been very near death then. In fact, there is no real evidence that she repented of the sale.

As to the ascertainment of the intention of contracting parties, in *Norwich Union Fire Insurance Society* v. *William H. Price Ltd.*,[10] Lord Wright said:—

> "It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic. Whether the mistake does satisfy this description may often be a matter of great difficulty."

With the greatest respect to the learned trial judge, therefore, I do not think the mistake in the instant case presents a very difficult problem. After all, it related to the sale of a half-acre only, out of approximately 34½ acres. In point of fact, was this half-acre so conspicuously different from the rest that it should not have been lumped together with them? Oh Hiam

herself considered it as rubber land, in spite of the house thereon, when she filed her estate duty affidavit in 1948. Had it been as valuable in 1956 as the respondents contended (remembering that they had made no attempt to support their contention by producing any valuation thereof at the trial) one should have thought that Oh Hiam herself could not have been oblivious of such a valuable piece of property, which by itself should have readily fetched a price more than sufficient to pay for her trip to the hospital in Australia. In any event, event if she made a mistake, which I doubt, it was not such a fundamental mistake as to entitle the respondents to relief. As long ago as 1847, an English Court in *Okill* v. *Whittaker* [1] decided that, under somewhat similar circumstances, a conveyance should be upheld. In that case, premises were sold for the residue of a term, of which both parties at the time supposed that 8 years only were unexpired, and the price was fixed accordingly, but it afterwards appeared that 20 years were in fact unexpired at the time of the sale. Upon the vendor seeking to make the purchaser a trustee of the term for the additional 12 years, Lord Cottenham L.C., dismissing the bill, said:—

"Suppose a party proposed to sell a farm, describing it as 'all my farm of 200 acres', and the price was fixed on that supposition, but it afterwards turned out to be 250 acres, could he afterwards come and ask for a reconveyance of the farm, or payment of the difference? Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or a larger acreage is immaterial."

With respect, I would apply the same reasoning to this case. I do not think that what essentially was a mistake, due entirely to the fault of the vendor herself, should serve as a ground sufficient in law to deprive the blameless purchaser of a bargain. The maxim, *caveat emptor* is not wholly one-sided.

It was urged, on behalf of the respondents, that they were induced by a mistake on the part of their mother, the administratrix, to consent to the order of sale, and that a consent given under a mistake was no consent at all; consequently the order given as regards this particular piece of land should be set aside. The other 34 acres had already been resold; hence, admittedly, the order cannot be set aside concerning these six lots. For my own part, I am far from satisfied as to the merits of this argument. The mistake, if at all it was one, was not a fundamental mistake. The respondents were all adults. If they chose to give their consent blindly, and none of them claimed to have made any enquiries before doing so, they had only themselves to blame. I do not think there is any equity in their favour under the circumstances.

I would accordingly allow this appeal and set aside the order of the court below, with costs in both courts to the appellant.

Appeal allowed.

Solicitors: *Oorjitham & Lam; Skrine & Co.*

HOW PAIK TOO v. MOHIDEEN

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) September 18, 1967]

[Ipoh — Federal Court Civil Appeal No. X. 40 of 1967]

Landlord and Tenant — Recovery of possession — Rent-in arrears — Control of Rent Ordinance, 1956, s. 12(1)(a).

Practice and Procedure — Appeal — New point taken on appeal for first time — Principle on which an appellate court will deal with such new point.

The landlord succeeded in his claim for possession against his tenant on ground of rent being in arrears 14 days or upwards after notice of demand. The tenant appealed on the ground that no demand for rent had been made by the landlord on the premises and that demand on the premises was necessary before rents could be lawfully due. This point was not pleaded in the defence. As no finding on this issue was made by the trial magistrate the judge on appeal ordered a retrial of this issue. Against this order of retrial the landlord appealed.

Held: (1) the point raised on appeal that no demand was made on the premises was not a fact in issue raised by the pleadings at the trial before the magistrate;

(2) the defendant should not have been heard on the new ground raised for the first time on appeal.

Cases referred to:—

(1) *The "Tasmania"* (1890), 15 App. Cas. 223, 225.

(2) *Page* v. *Bowdler* (1894), 10 L.T.R. 423.

(3) *Leong Hoi Kow* v. *Chan Ho Yat* [1951] M.L.J. 63.

FEDERAL COURT.

Peh Swee Chin for the appellant.

P. P. Dharmananda for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Ipoh, allowing the appeal against the judgment of the magistrate's court at Tapah and ordering a retrial on the ground that the learned trial judge had failed to come to a finding of fact on the issue of demand.

It is necessary to refer to some facts of the case.

The appellant, whom I will refer to as the landlord brought this action against the respondent, whom I will refer to as the tenant, for possession of certain premises on the ground that the rent lawfully due had been in arrear for 14 days or upwards.

The defence whilst admitting that the said rents were in arrear alleged that this was done at the request of the landlord himself who stated that this method of payment would be more con-